IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals
Hoekstra, PJ, and Sawyer and Gleicher, JJ

IN THE MATTER OF WANGLER/PASCHKE Minor children	Circuit Court No. 07-035009-NA Court of Appeals No. 318186 Supreme Court No. 149537

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APPELLANT MOTHER'S BRIEF
ORAL ARGUMENT REQUESTED

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Dated: May 26, 2015

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INTRODUCTION

Appellant Mother, Melissa Paschke, appeals the trial court's order dated July 16, 2013 and Amended Order dated August 1, 2013 (304a), terminating the parental rights to her three minor children. The trial court erred because the court terminated the rights to her minor children without ever properly adjudicating her.

Because child protective proceedings implicate constitutionally protected liberty interests, our Supreme Court promulgated court rules designed to safeguard parents' due process rights. One rule, MCR 3.971, addresses the procedures that control a court's assumption of jurisdiction over the child. Before a court may exercise jurisdiction based on a parent's plea, it must satisfy itself that the parent knowingly, understandingly, and voluntarily waived certain rights. MCR 3.971(C)(1). Here, no dialogue between court and parent took place because the court adjudicated her based on a document she signed eleven months ago and she was not present in court. The mediation procedure employed as a substitute for an adjudicative trial improperly bypassed the due process protections enshrined in the court rules. Thus, the court never obtained jurisdiction.

The Court of Appeals denied Appellant Mother's Appeal by Right. See *In re Wangler/Paschke*, 853 N.W.2d 402, 305 Mich App 438 (2014), **in a split published opinion** of the Court of Appeals (see Attachment B). The Majority Opinion in *In re Wangler/Paschke* sanctions an inappropriate practice of holding adjudication pleas in abeyance in excess of eleven months and then misapplies the collateral attack rule laid down in *In re Hatcher*, 443 Mich 426, 433; 505 N.W.2d 834 (1993) to preclude any appellate review of this process.

The procedure of holding a written plea in abeyance for a period of eleven months and then accepting the plea after the respondent parent has been participating in the dispositional

phase is an issue of first impression and the majority decision reached by the Court of Appeals is clearly erroneous and will cause material injustice MCR 7.302(B)(6).

This Court in *In re Sanders*, 495 Mich 394, 422; 852 N.W.2d 542, 539 (2014), reaffirmed that adjudication and the right to a jury is a constitutional right that cannot be waived. The Michigan Court Rules require that the trial court is satisfied that the Respondent Parent understands the rights he or she is giving up before he or she admits to the allegations in the Petition. This cannot occur if the adjudication process occurs outside the courtroom at mediation and with no court supervision.

STATEMENT OF QUESTIONS PRESENTED

I. Was the Appellant Mother's appeal to the Michigan Court of Appeals a collateral attack on the trial court's jurisdiction if the first dispositional order that was appealable by right did not follow a valid dispositional hearing which in turn was preceded by a valid adjudication?

The trial court did not answer the question.
Respondent-Appellant answers "No" to the question.
The Court of Appeal's majority answered "Yes" to the question.

II. Does the acceptance of an eleven month old signed mediation agreement taken thirteen months after the filing of the Original Petition and without the presence of the Respondent Parent in the courtroom constitute an invalid adjudication that violates the due process rights of Appellant Mother and does the collateral attack analysis in *In re Hatcher*, 443 Mich 426 (1993) not bar Appellant Mother's due process challenge?

The trial court did not answer this question.
Respondent-Appellant answers "Yes" to the question.
The Court of Appeals Majority Opinion did not address Appellant Mother's due process challenge.

STATEMENT OF THE BASIS OF JURISDICTION

This Court has jurisdiction pursuant to Const 1963, art 6, §4; MCL 600.212; MCL 600.215(3); and MCR 7.301(A)(2) to review by appeal a case after a decision by the Court of Appeals.

On September 11, 2013, a Claim of Appeal and Order Appointing Appellate Counsel was filed with the Michigan Court of Appeal. On May 27, 2014, the Court of Appeals affirmed the trial court's termination of Appellant Mother's parental rights. A timely application was filed with this Court within 28 days of the Court of Appeals' decision. MCR 7.302(C)(2).

On April 1, 2015, this Court granted the Application.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Appellant Melissa Paschke, hereinafter "Appellant Mother" appeals the Honorable John R. Monaghan's July 16, 2013 Order and August 1, 2013 Amended Order terminating her parent rights to her three minor children: Jamie Wangler (18 years of age, DOB: 12/05/1995), Joshua Wangler (16 years of age, DOB: 4/11/1999), and Marissa Paschke (12 years of age, DOB: 12/17/2002). Since this case has been on appeal the court's jurisdiction over Jamie has terminated because he has turned 18 and the other two children have remained in the custody of their respective fathers.

The Original Petition of Abuse and Neglect dated January 11, 2012 alleged that Appellant Mother had an opiate addiction and was the victim of domestic violence at the hands of an individual named Matt Brown.

The children were removed and a preliminary hearing was held on January 11, 2012 (7a-9a). The children's placement was continued with a maternal aunt and The Department of Human Services, hereinafter "DHS", was given the discretion to determine nature and level of visitation with the Appellant Mother. The Petition was continued until January 19, 2012 to allow Appellant Mother to obtain counsel.

The preliminary hearing continued on January 19, 2012 and Appellant Mother was appointed counsel (11a). On the advice of counsel, Appellant Mother waived her right to a probable cause hearing and agreed to take random drug screens and substance abuse classes. Appellant Mother also agreed that Matt Brown would be removed from the home and was not return to her residence. Following the preliminary hearing, the Petition alleging abuse and neglect was authorized and the matter was scheduled for mediation.

On February 28, 2012, the parties participated in mediation and reached an agreement. The mediation agreement stated:

> "a) Based on the agreement of all parties, the mother's Plea of Admission and the issue of jurisdiction will be held in abeyance for a period of six months.
>
> b) Mother agrees to a DHS Service Plan which includes:
> i) Residential treatment if approved
> ii) Outpatient services
> iii) Random drug screens
> iv) No Contact Order with Matthew Brown
>
> c) Mother's visitation shall be at the supervision level, duration and frequency as determined by D.H.S.
>
> d) Any necessary communication between Melissa and Matthew Brown in regards to transportation will be done through a DHS approved individual.
>
> e) Request the Court set a review hearing within 90 days."

The mediation agreement is located at 66a-67a.

Following mediation, the parties never went before a judge or a referee nor was a plea taken by the trial court. The agreement was simply filed with the trial court. The Appellant Mother signed a plea form (68a-69a) which indicated that she admitted to the following paragraphs of the original Petition of Abuse and Neglect (70a-75a):

> "8. On November 22, 2011 a Children's Protective Services case was opened due to Domestic Violence and drug abuse. At this time Melissa Paschke acknowledged an addiction to heroin, and a history of domestic violence in her relationship with Matthew Brown.
>
> * * *
>
> 13. At the time of this filing, Melissa Paschke has failed to provide any verification of attendance and/or completion of in-patient treatment for her substance addiction.

> 14. On December 28, 2011 Melissa Paschke was involved in a domestic dispute with her boyfriend, Matthew Brown. During that dispute, Mr. Brown struck Ms. Paschke in the face causing bruising and a swollen eye. Ms. Paschke contacted her sister Katie Wilson to request assistance; upon retrieving Melissa, Ms. Wilson noted that Ms. Paschke had bruising to her face and a swollen eye and Melissa acknowledged this was from Matt Brown."[1]

A review hearing was held on May 3, 2012. Appellant Mother was not present at the review hearing. The Department of Human Services worker, Lane Smith, stated that for the six weeks prior to the May 3, 2012 review hearing the Appellant Mother has been unavailable and has not participated in the drug testing since the first week of February. Lane Smith indicated that he is substituting in for the DHS worker that was handling the case and indicated that he did not know the whereabouts of the Appellant Mother, just that the case worker currently assigned to the case has been unable to make contact with her for the last six weeks by phone.

Again, the Appellant Mother was not present at the August 2, 2012 review hearing. The DHS worker, Ms. Holtrop, indicated that Appellant Mother has been to counseling three times and that her counsel has referred her to a women's shelter. Ms. Holtrop summarized the counselor's status report for the court. It was reported that Appellant Mother still was missing drug screens. Following this review hearing the court suspended Appellant Mother's parenting time until she was able to submit to 60 straight days of negative drug testing.

The next dispositional review hearing was held on November 1, 2012. Appellant Mother was present and represented by counsel at this hearing. At the hearing, the DHS worker, Ms. Holtrop, testified that her first contact with Appellant Mother was in the beginning of September 2012 in the Sanilac County Jail. She stated that Ms. Holtrop testified that Appellant Mother was released on October 10, 2012 and contacted the foster care worker and was referred for services.

[1] See Petition of Abuse and Neglect dated January 11, 2012.

Appellant Mother was enrolled in counseling, given a parenting mentor and was administered a daily drug screen. Appellant Mother also became involved with an NA support group in her area. As of the court date (November 1, 2012), Ms. Holtrop testified that Appellant Mother has been compliant. She testified that she did have a drug screen, but tested positive for benzodiazepines. The foster care worker testified that this could be the result of her prescription medication, but the foster care worker had not had a chance to investigate.

At the next review hearing on January 31, 2013, Exhibit 18 was entered into evidence which showed that the Appellant Mother was incarcerated in the Wayne County Jail for a violation of the terms of her tether. The letter authored on December 18, 2012 indicated that she will be incarcerated until **at least** December 26th, if not longer. 184a.

At the January 31, 2013 review hearing, the Petitioner and Judge Clabuesch realized that although the case has been open for over a year, at no time had the court assumed jurisdiction over these minor children nor had the original Petition been adjudicated. The prosecutor stated:

> "MR. SCOTT: Your Honor, we did a mediation agreement back, I believe it was the 28th of February, where mother gave a plea but it was held in abeyance for a period of time and at that time it appeared she was going to participate in services and she's done some things along the way, but since probably the middle part of August she's just dropped off the face of the earth and we've not really – nobody's asked the Court to assume jurisdiction. I would assume that Ms. Holtrop is going to ask you to do that today so that we can proceed – she's going to be asking you to allow her to proceed toward termination as well with the mother."[2]

The Court then addresses the matter and issues its findings regarding jurisdiction and states:

[2] 193a-194a

> "THE COURT: Okay, then here's what I'm gonna do, I'm gonna – if there hasn't been an established jurisdictional level, based on the mediation, I will take at this point, formal jurisdiction as an Act 87 ward. I think there probably is an order or something to that effect in the file, but if there's not, there will be as of today based on the – on the – on the stipulated mediation results. That's the purpose, my understanding, of the mediation was to avoid the need for a Jury trial and findings and putting people through that. Now, the failure to comply since August by – by the mother is a post-mediation event, so I think that I can go back and say that we have a basis for placement. I think it is contrary to the best interest of the children to be in the home based on the content of the petition. I think that reasonable efforts are being made right now to put everybody back together, based on the reports that I have through exhibits one through twenty, and I will find that the fathers in each case have had – are making progress."[3]

There was no prior order regarding adjudication and trial court signed an order titled "Order Following Dispositional Review Hearing"(202a) and the last paged added a paragraph that stated: "Based upon the Stipulated Mediation Resolution, the Court takes formal jurisdiction of the minor children as an Act 87 Ward." 206a. DHS then filed a Supplemental Petition of Abuse and Neglect on March 13, 2013. 208a-212a.

The termination hearing was adjourned two times on April 18, 2013 (213a) and on May 30, 2013 (218a). The termination hearing was not held until June 26, 2013. At the termination hearing the DHS case worker assigned to the case for portion of the time the case was open was the only witness called to testify. Appellant Mother was present. On July 16, the trial court terminated Appellant Mother's parental rights.

Appellant Mother appealed to the Michigan Court of Appeals and argued that because there was never an adjudication the Appellant Mother was entitled to challenge the trial court's jurisdiction over her because the termination order was the first dispositional order. The

[3] 195a

Michigan Court of Appeals misapplied the collateral attack doctrine and stated Appellant Mother's appeal was untimely. Additionally, Appellant Mother argued that the mediation and use of a plea form in lieu of a knowingly and voluntary plea in front of a judge to assume jurisdiction over these children violated procedural due process. The majority opinion did not address Appellant Mother's due process claims.

ARGUMENT

I. Appellant Mother's appeal to the Michigan Court of Appeals was not a collateral attack on the trial court's jurisdiction because before a parent can have a first dispositional order that is appealable by right the trial court needs to hold a valid adjudication hearing which must be followed by a valid dispositional hearing.

Standard of Review

If this Court finds that the collateral attack rule does not apply, this Court reviews a lower court's decision to exercise jurisdiction for clear error in light of the court's findings of fact." *In re BZ*, 264 Mich App 286, 295; 690 N.W.2d 505 (2004). Whether the court has jurisdiction is determined by a parent's plea of admission or no contest, MCR 3.971, or by the court or a jury at a trial, MCR 3.911(A); MCR 3.972. If the court conducts a trial, the trier of fact must find that one or more of the statutory grounds for jurisdiction have been proven by a preponderance of the evidence. MCR 3.972(C)(1) and (E); *In re S R*, 229 Mich App 310, 314; 581 N.W.2d 291 (1998).

A. Meaning of the Phrase "Dispositional Order"

A dispositional hearing is a hearing in which a judge decides on a plan to help a child have a safe home. A dispositional order is a report reduced to written form that is consistent with what the trial court judge has decided at a dispositional hearing. Before there can be a dispositional hearing and a subsequent dispositional order, there first has to be an adjudication. In summary, the statutory framework and the Michigan Court Rules dictate that the proper and only logical way that child protective proceedings must occur is in the following order:

- Adjudication
- Initial dispositional hearing
- Dispositional orders

MCR 3.973, "Dispositional Hearing" subsection (A) entitled, "Purpose" indicates:

> "A dispositional hearing is conducted to determine what measures the court will take with respect to a child **properly within its jurisdiction** and, when applicable, against any adult, once the court has determined **following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true.**"

MCR 3.973, subsection (F) entitled, "Dispositional Orders" states:

> "(1) The court shall enter an order of disposition as provided in the Juvenile Code and these rules.
>
> (2) The court shall not enter an order of disposition until it has examined the case service plan as provided in MCL 712A.18f. The court may order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child."

At no point in the Michigan Juvenile Code is the term "dispositional hearing" or "dispositional order" specifically defined. However, the phrase "order of disposition" appears in the following sections of the Juvenile Code. MCL 712A.18f(2) and (4) states:

> "(2) Before the court enters an order of disposition in a proceeding under section 2(b) of this chapter, the agency shall prepare a case service plan that shall be available to the court and all the parties to the proceeding.
>
> * * *
>
> (4) Before the court enters an order of disposition, the court shall consider the case service plan; any written or oral information offered concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, lawyer-guardian ad litem, attorney, or guardian ad litem; and any other evidence offered, including the appropriateness of parenting time, which information or evidence bears on the disposition. The order of disposition shall state whether reasonable efforts have been made to prevent the child's removal from his or her home or to rectify the conditions that caused the child's removal from his or her home. The court may order compliance with all or any part of the case service plan as the court considers necessary."

Finally, MCL 712A.2 states that when the petition of abuse and/or neglect is filed in the circuit court family division the "authority of the court to proceed is governed by rule of the Supreme Court." Here, MCR 3.973 states that a dispositional hearing can only occur with respect to a child "properly within its jurisdiction" following a trial or plea hearing. Once the child is properly within the court's jurisdiction then a dispositional review hearing can be held and the court may issue dispositional orders and modify them at later dates.

Additionally, after the initial dispositional hearing review hearings must be conducted by the trial court periodically and the court is to determine a continuing necessity and appropriateness of the placement and can continue the dispositional order, modify the dispositional order, or enter a new dispositional order. These additional review hearings are generally referred to as dispositional review hearings in common practice. MCL 712A.19(8).

B. The Termination Order Constituted a First Dispositional Order and is Appealable by Right.

Ordinarily, a jurisdiction cannot be collaterally attacked following an order terminating parental rights. *In re Gazella*, 264 Mich App 668, 679-680; 692 N.W.2d 708 (2005). That is true, however, only when a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order. If termination occurs at the **initial disposition** as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition.

MCR 3.993(B) provides that an Order of Adjudication may only be appealed by leave granted, **whereas an initial order of disposition is the first order appealable as of right**. Accordingly, because an initial order of disposition is the first order appealable as of right, an

appeal of the adjudication following the issuance of an initial dispositional order is not a collateral attack on the initial adjudication, but a direct appeal, notwithstanding that a termination of parental rights may have occurred at the initial dispositional hearing.

When the adjudication in this case occurred, if at all, is a question that needs to be answered by This Court. The Appellee takes the position that based on the Appellant Mother's failure to comply with the mediation agreement dated 2/28/12 (66a-67a) and the trial court's finding that the Appellant Mother did not comply with the terms of the mediation agreement that the date of adjudication should be February 28, 2012 because her plea was held in abeyance pending her agreement to comply with the service plan for the six months following the signing of the mediation agreement. (66a-67a). The Michigan Court of Appeals in, *In re Wangler*, 305 Mich App. 438, 447-448;853 N.W.2d 402 (2014), the majority opinion found that the court took jurisdiction following the January 31, 2013 dispositional review hearing and the subsequent order following that dispositional review hearing, which was signed on February 4, 2013 was the first dispositional order because "it was the first order wherein the trial court formally exercised its jurisdiction pursuant to the medication agreement." 324a.

Judge Elizabeth Gleicher in her dissenting opinion, *In re Wangler (dissenting)*, 305 Mich. App. 448 (2014) agreed with the majority opinion that the court did not address jurisdiction until February 2013 when it entered the plea secured during the previous mediation session. Judge Gleicher, however, disagreed with the majority that the February 4th order was the first order appealable by right. Judge Gleicher opined:

> "The majority holds that the February 4, 2012 hearing at which the court took jurisdiction qualified as the initial dispositional hearing, triggering respondent's right to appeal the adjudication of the right pursuant to MCR 3.993(A)(1). However, the court rules provide that unless the initial dispositional hearing "is held immediately after the trial, notice of hearing may be given

> by scheduling it on the record in the presence of the parties or in accordance with MCR 3.920." No evidence supports that the court properly noticed or ever actually scheduled a dispositional hearing. Nor did the court ever enter an order of disposition as required under MCR 3.973(F)(1), which would have started the clock for appellant's appeal as of right to the adjudication.
>
> Moreover, the process by which the court took jurisdiction over the children contravened the court rules. A court may take jurisdiction over a child only if "at least one statutory ground for jurisdiction in MCL 712A.2(b)" is proven at an adjudicative trial pursuant to MCR 3.972, or following a plea to the allegations in the jurisdictional petition obtained pursuant to the procedures detailed in MCR 3.971. *In re SLH*, 277 Mich App at 669. Participation in mediation is not an invitation to circumvent due process. Here, the court lacked the authority to take jurisdiction over the children because it did not follow the procedures mandated by the court rules." (229A-330A).

Appellant Mother agrees with Judge Gleicher's position because there was never a hearing that even remotely resembled an adjudication, and because there was no adjudication, *In re Hatcher* does not apply to this case. Simply put, you cannot collaterally attack something that does not exist. MCR 3.973a provides for dispositional hearings only after the child is "properly within the Court's jurisdiction." Because there was no adjudication, there could be no valid dispositional hearing and an initial dispositional order is not present in this case.

C. The trial court did not properly serve Appellant Mother with a Notice of Hearing when the court took jurisdiction at the January 31, 2013 scheduled review hearing.

The court realized that it failed to take formal jurisdiction over the minor children at one of its regularly scheduled review hearings on January 31, 2013. The Notice of Hearing and Proof of Service for the January 31, 2013 hearing would have been mailed out following the previous review hearing. The Order following the previous November review hearing simply

indicated that the next hearing was scheduled for a dispositional review hearing on "1/31/2013 10:00 a.m." 181a.

The Proof of Service related to that order and the January 31, 2013 hearing was served by first class mail on Appellant Mother's attorney but not on the Appellant Mother. 182a. In fact, her name is crossed off on the Proof of Service. 182a.

Because the matter was not scheduled for an adjudication hearing, Appellant Mother was not properly served with a proper Notice of Hearing. MCR 3.920, "Service of Process" states that after a party's first appearance before a court, notice may be served on the party's attorney by first class mail "except that a summons must be served for trial as provided in subrule (B). Subrule (B) requires personal service of summons.

Furthermore, MCR 3.920 requires special service of process considerations in juvenile proceedings when parents are incarcerated. MCR 3.920(A)(2). When a court has notice that a party is incarcerated it must comply with MCR 2.004 which requires the court to:

1. Contact the department to confirm incarceration.
2. Serve the incarcerated parent with the Orders and file a Proof of Service.
3. Allow the incarcerated parent a chance to participate by video or phone.

(See MCR 2.004)

A memorandum dated December 18, 2012 from the DHS foster care worker to the trial court indicated that prior to the scheduled hearing on January 31, 2013, the Appellant Mother was incarcerated in the Wayne County Jail until "at least December 26, 2012." 184a. Furthermore, the court report prepared for the January 31, 2012 hearing indicated that the DHS case worker last reported contact with Appellant Mother was December 9, 2012. 187a. Both the DHS memo and the court report were admitted as exhibits at the January 31, 2012 hearing.

Finally, the Appellant Mother's attorney stated at the hearing that he had sent her a letter in November but she had not spoken with her when asked by the court why she was not present at the January 31, 2012 hearing. 191a. The trial court made no attempts to contact the Wayne County Jail.

Knowing all of this the court failed to even remotely comply with the MCR 2.004 and proceeded to take jurisdiction based on the eleven month old mediation agreement once the court was informed by the DHS that "we do not have an adjudication in this case." 193a.

D. The court misapplied *In re Hatcher* because (1) the collateral attack rule does not apply to terminations that occur following the first dispositional order or appeals when there was no adjudication, and (2) *In re Hatcher* only applies to situations where a direct appeal was available and in this case Appellant Mother had no notice of her appellate rights.

Here, the record suggests that because there was no adjudication by way of trial or a plea of admission, all of the court orders are invalid and the collateral attack rule does not apply because any dispositional order simply does not exist. Or, in the alternative, if this Court recognizes the adjudication, the first dispositional order would have to be a the termination order based on the reasoning in Judge Gleicher's dissent (129a-130a). And because the Appellant Mother was not present when the court realized it did not have jurisdiction, the adjudication and dispositional order following the January 31, 2012 hearing is invalid because the trial court did not have proper service on the Appellant Mother and the trial court had notice that she was likely incarcerated at the time of the hearing.

II. The acceptance of an eleven month old signed mediation agreement taken thirteen months after the filing of the Original Petition and without the presence of the Respondent Parent in the courtroom constitutes an invalid adjudication that violates the due process rights of a Respondent Parent and the collateral attack analysis in *In re Hatcher*, 443 Mich 426 (1993) does not bar Appellant Mother's due process challenge.

Standard of Review

The trial court's actions violated Appellant Mother's statutory and constitutional rights. Unpreserved constitutional and statutory challenges are reviewed to determine whether plain error exists that affects substantial rights. *People v Carines*, 460 Mich 750, 764; 597 N.W.2d 130 (1999). Reversal is required where the trial court's errors "seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id.* at 763.

A. *In re Hatcher* and the collateral attack rule do not apply to a procedural due process challenge.

In re Hatcher, 443 Mich 426; 505 N.W.2d 834 (1993), overruled, *Fritts v. Krugh*, 354 Mich 97; 92 N.W.2d 604 (1958), which had allowed a subject matter collateral attack after termination. But *In re Hatcher* did not disagree with the ultimate result the *Fritts* court reached, but rather it disagreed with the reasoning the *Fritts* court used to reverse the trial court. *In re Hatcher* specifically states that what the *Fritts* court was actually trying to correct a perceived gross lack of procedural due process.

> "In its reasoning, the Fritts Court attempted to correct what it perceived to be a gross lack of procedural due process. The mother attempted to withdraw the adoption petition and both parents disputed the finding of neglect, but were precluded from presenting evidence supporting their position. To remedy the situation, the

> Court permitted collateral attack on the exercise of jurisdiction. It held that the probate court lacked subject matter jurisdiction until sufficient facts had been established by competent evidence to support the petition. It blurred the distinction between the existence of subject matter jurisdiction and the exercise of that jurisdiction to justify the collateral attack. It held that the probate court abused its power and that the lack of a proper direct appeal was a mere technicality." *Id.* at 440-441.

In *In re Hatcher* This Court overruled *Fritts* and held that a court's subject matter jurisdiction is established when the proceeding is of a class the court is authorized to adjudicate and the claim stated in the petition is not frivolous. This Court further stated that the trial court's valid exercise of its jurisdiction is determined from the petition after the judge has found probable cause to believe that the allegations contained with the petition are true. This court concluded by holding that "our ruling today severs a party's ability to challenge a probate court decision years later in a collateral attack **where a direct appeal was available."** *Id.* at 444. No wording in the opinion suggests that a respondent parent cannot challenge jurisdiction on due process grounds.

B. Direct appeal has to be available for *In re Hatcher* to apply.

As stated above a direct appeal has to be available for the collateral attack rule to apply. Appellant Mother had no way to know that the January 31, 2013 "Review Hearing", one of many previous ones, would turn into an adjudication hearing when the court and DHS finally realized they never actually obtained jurisdiction.

As mentioned above, MCR 3.920 required personal service and specific notice that an adjudication would be held on January 31, 2013. This lack of notice precluded Appellant Mother

of knowing that an adjudication even took place let alone knowledge that she had a right to appeal the order.

In *In re Rood*, 483 Mich. 73; 763 N.W.2d 587 (2009), This Court held that a parent is entitled to procedural due process if the state seeks to terminate parental rights and the state must make reasonable efforts to notify a parent of the proceedings and allow meaningful participation. *Id* at 483 Mich. 121. This Court further stated "we evaluate whether a particular parent was afforded minimal due process on a case-by-case basis" and that failure to comply with court rules and statutory notice requirements, as well as requirements that the state attempt to locate assess, and engage a nonparticipating parent can deprive a parent of minimal due process. *Id.*

C. *In re Sanders* held that due process requires a specific adjudication of a parent's unfitness.

In re Sanders, 495 Mich 394, 422; 852 N.W.2d 542, 539 (2014) held that "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship."

This Court further stated that the failure to hold an adjudication is an unconstitutional violation of the due process clause of the Fourteenth Amendment. *Id.* at 422.

In re Sanders, reaffirmed that adjudication and the right to a jury is a constitutional right that cannot be waived. The Michigan Court Rules require that the trial court is satisfied that the Respondent Parent understands the rights he or she is giving up before he or she admits to the allegations in the Petition. This cannot occur if the adjudication process occurs outside the courtroom at mediation and with no court supervision.

This Court has yet to address whether the collateral attack rule applies to a *Sanders* challenge to a trial court's adjudication. However, the Court of Appeals in a published decision,

In re Kanjia (on reconsideration), _____ Mich App ____, ____, ____; N.W.2d ____ (2014); slip op at 7, found that a respondent may raise a *Sanders* challenge from the trial court's order terminating the parental rights and that it did not constitute a collateral attack on adjudication. The court stated:

> "Nonetheless, we conclude that a *Sanders* challenge, raised for the first time on direct appeal from an order of termination, does not constitute a collateral attack on jurisdiction, but rather a direct attack on the trial court's exercise of its dispositional authority. In *Sanders*, our Supreme Court distinguished between adjudicated and unadjudicated parents; it held that "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *In re Sanders*, 495 Mich. at 422. In other words, the Court in *Sanders* held that due process prevents a trial court from entering dispositional orders – including orders of termination – against an unadjudicated respondent. Based on this reasoning, a respondent who raises a *Sanders* challenge on direct appeal from a trial court's order of termination does not collaterally attack the trial court's exercise of jurisdiction, but rather directly challenges the trial court's decision to terminate the respondent's parental rights without first having afforded the respondent sufficient due process, i.e., an adjudication hearing at which the respondent's fitness as a parent was determined.

D. Court Rule in Question

Michigan Court Rule **3.971** "Pleas of Admission or No Contest**"** states:

"(A) General. A respondent may make a plea of admission or of no contest to the original allegations in the petition. The court has discretion to allow a respondent to enter a plea of admission or a plea of no contest to an amended petition. The plea may be taken at any time after the filing of the petition, provided that the petitioner and the attorney for the child have been notified of a plea offer to an amended petition and have been given the opportunity to object before the plea is accepted.
(B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:
(1) of the allegations in the petition;
(2) of the right to an attorney, if respondent is without an attorney;
(3) that, if the court accepts the plea, the respondent will give up the rights to
(a) trial by a judge or trial by a jury,

(b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
(c) have witnesses against the respondent appear and testify under oath at the trial,
(d) cross-examine witnesses, and
(e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;
(4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent.

(C) Voluntary, Accurate Plea.
(1) Voluntary Plea. The court shall not accept a plea of admission or of no contest without **satisfying itself** that the plea is knowingly, understandingly, and voluntarily made.
(2) Accurate Plea. The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, **preferably by questioning the respondent** unless the offer is to plead no contest. If the plea is no contest, the court shall not question the respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. The court shall state why a plea of no contest is appropriate."

Due to the fact that mother was no present at the review hearing in which the trial court used a mediation agreement that was formed as basis for **avoiding adjudication and a jury trial it would be impossible for the court to comply with MCR 3.971 without having the Respondent Mother present when it accepted her plea.** The court cannot "satisfy itself" under MCR 3.971(C) that the plea was voluntary and accurate without having the respondent in court. Additionally MCR 3.971(C)(2) requires an independent finding that plea is accurate and the court rules instruct the judge to question the respondent directly about the plea unless it is a no contest plea.

C. Appellant Mother's procedural due process challenge applies to the entire proceeding, not just to the plea hearing.

The trial court violated Respondent Mother's due process rights by using the invalid plea to reduce the Department's evidentiary burden. Michigan Court Rule 3.971(B) requires the trial court to advise a parent of a number of rights prior to accepting a plea. Among other things, the

court must advise a parent "of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent." The court must also make a determination that the plea is voluntary and make an independent determination that the plea is accurate. MCR 3.971.

At no point did the trial court make a finding that the plea was voluntary and accurate nor did the court advise Respondent Mother of the consequences of her plea as it related to the subsequent termination of her parental rights. The court clearly erred by failing to do so thereby rendering the plea invalid; it should not have been accepted by the court.

The trial court's acceptance of the invalid plea seriously affected Respondent Mother's rights and affected the entire termination proceeding. See, *In re Blocker*, unpublished per curiam opinion of the Court of Appeals, issued on January 17, 2008 (No. 279581) (reversing termination of parental rights decision because trial court failed to advise parent that his plea to jurisdiction could be used as evidence against him at the termination of parental rights hearing). Michigan court rules permit the use of hearsay evidence to prove statutory grounds for termination only in situations where the respondent parent entered into a plea for jurisdiction or had a trial on the petition allegations. MCR 3.977(G)(2). Thus, as a direct consequence of Respondent Mother's plea, the Department's evidentiary burden in the TPR proceedings was significantly relaxed as it was permitted to prove its case using hearsay evidence.

Throughout 18 months this case was open, much of the evidence admitted at the various hearings was proven through hearsay. Evidence introduced at each dispositional review hearing, which became part of the record on which the trial court based its termination decision, was replete with hearsay. This included evidence of alleged drug use by Respondent Mother, which she contested on numerous occasions, the speculated relationship between Respondent Mother

and Mr. Brown, and the progress Respondent Mother was making in her substance abuse therapy. These concerns, all of which played a major role in the trial court's decision, were never proven with legally admissible evidence.

Petitioner's Exhibits 11- 23 and admitted into evidence are all hearsay and would never had been able to be admitted at an adjudication trial or at a termination trial at the initial disposition. Judge Gleicher in her dissenting opinion spent seven paragraphs detailing all of the evidence admitted during the course of these proceedings that should have been ruled inadmissible had the trial court following the court rules. 331a-332a.

The pervasive use of hearsay continued into the final termination hearing. At that hearing, the case worker testified about statements supposedly made to him by a variety of people including Respondent Mother's therapist, the children's therapists, and the psychologist who evaluated the family. None of these people testified at trial. Additionally, much of protective service worker's testimony was hearsay as well. For example, she testified about prior reports made on the family before she began working on the case, and drug test results which she did not personally administer or observe.

In short, if trial court had not accepted Respondent Mother's invalid plea, the use of hearsay testimony against her would have been impermissible and would have constituted clear error. See *In re Gilliam*, 241 Mich App 133, 137; 613 NW 2d 748 (2000) (reversing TPR because trial court improperly relied on hearsay evidence).

The use of an invalid plea to reduce the Department of Human Service's evidentiary burden – rendered the entire proceeding "fundamentally unfair" and significantly increased the likelihood of an erroneous deprivation of Respondent Mother's parental rights. The trial court's failure to adhere to the strict procedures set forth by case law, statutes and court rules resulted in

a decision that “seriously affected the fairness, integrity or public reputation” of the judicial proceeding, *Carines, supra*, and constituted plain error.

E. Case Law

Appellant has been unable to locate a case where a plea was taken without the presence of the Respondent Parent. However, both our Supreme Court and the Court of Appeals have addressed the issue the validity of a plea and whether it warrants vacating a termination order. In *In re Hudson*, 763 N.W.2d 618, 483 Mich. 928 (Mich. 2009), our Michigan Supreme Court considered a challenge to a validity of a plea under the plain error standard of review when the issue was not preserved:

> Had respondent been represented by counsel during the preliminary hearing, counsel could have fully advised her of the consequences of a plea of admission, which the trial court failed to do. Instead, without full information and understanding of the consequences, respondent admitted most of the allegations in the petition. Respondent's admissions relieved the DHS of the burden of proving the allegations in the petition by a preponderance of the legally admissible evidence, MCR 3.972(C)(1), and enabled the trial court to immediately assume jurisdiction. After the court assumed jurisdiction, it ordered drug screenings of respondent and Morgan and psychological evaluations of the parents and children. The results of these court-ordered services unquestionably formed the basis for the court's later termination decision.
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> A child protective proceeding is "a single continuous proceeding." *In re LaFlure*, 48 Mich.App. 377, 391, 210 N.W.2d 482 (1973). In deciding whether to terminate parental rights, a trial court considers evidence admitted at all dispositional and review hearings. Id. In this case, the combination of the trial court's errors at the preliminary hearing in failing to appoint counsel and in accepting respondent's invalid plea affected the entire proceeding that followed. First, respondent's invalid plea formed the basis for the trial court's exercise of jurisdiction and for the admission of evidence at subsequent proceedings. Once the allegations in the state's petition are proven, at trial or by a plea, all relevant and material evidence is admissible at dispositional and permanency planning hearings.
>
> In this case, respondent's invalid plea formed the basis for the admission of hearsay evidence during subsequent hearings. In addition, hearsay evidence is only admissible at the termination hearing to prove the statutory grounds for termination where termination is sought on the same grounds that formed the basis for the trial court's exercise of jurisdiction. MCR 3.977(G)(2); see *In re Gilliam*, 241 Mich.App. 133 (2000) (reversing the trial court's termination decision where hearsay was admitted to prove grounds for

> termination that were unrelated to the initial reasons for jurisdiction); *In re Blocker*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2008 (Docket No. 279581) (reversing the trial court's termination decision where the trial court failed to advise the respondent of the consequences of his plea to the allegations in an abuse report, there was no indication that respondent stipulated the admission of the abuse report to establish the statutory grounds for termination, and the statutory grounds were not otherwise established by legally admissible evidence). Thus, respondent's invalid plea also formed the basis for the admission of hearsay evidence at the termination trial in this case.
>
> The trial court's error in failing to advise respondent of the consequences of her plea was compounded by the absence of counsel to represent respondent during all the dispositional and permanency planning hearings. Although the rules of evidence do not apply at dispositional and permanency planning hearings, and all relevant and material evidence, including oral and written reports, was admissible, MCR 3.971; MCR 3.972(C)(1); MCR 3.973(E)(1); MCR 3.976(D)(2); MCR 3.977(G)(2). Counsel for respondent could have challenged the evidence presented by the DHS and could have called and cross-examined the individuals who prepared the many reports DHS witnesses referenced in their testimony at these hearings. Instead, once these proceedings were set in motion by respondent's invalid plea, the DHS was allowed to present unchallenged hearsay evidence, including the results of respondent's drug screenings, psychologists' reports pertaining to respondent and the children, and statements of respondent's therapist, through the testimony of DHS workers. *Id*, at 483 Mich. 936-937.

Our Supreme Court in *In re Hudson* held:

> For the reasons explained by the Court of Appeals, the trial court clearly erred by finding that the DHS presented clear and convincing evidence to support the statutory grounds for termination. In addition, the trial court's errors in failing to advise respondent that her plea of admission could be used against her in a later termination proceeding and in failing to appoint counsel to represent her until 14 days before the termination trial violated statutory and court-rule based protections. These fundamental errors led to the admission of unchallenged and untested evidence in later proceedings. **In my view, these flaws deprived respondent of due process.** *Id.* at 483 Mich 940.

The Michigan Court of Appeals has also addressed the effect an invalid plea has on a termination in order in the context of an appeal by right in *In re S.L.H.*, 747 N.W.2d 547, 277 Mich.App. 662 (2008):

> In this case, the court failed to advise the mother that she had the right to an attorney. The court also failed to advise the mother that if the court accepted her plea, she would give up the following rights: (1) the right to trial by a jury; (2) the right to have the petitioner

prove the allegations in the petition by a preponderance of the evidence; (3) the right to have witnesses against the respondent appear and testify under oath at the trial; (4) the right to cross-examine witnesses; and (5) right to have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor. The court further failed to advise the mother regarding the consequences of her plea, including that the plea could later be used as evidence in a proceeding to terminate her parental rights.

MCR 3.971(C) provides:

(1) Voluntary plea. The court shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made.
(2) Accurate Plea. The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest. If the plea is no contest, the court shall not question the respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. The court shall state why a plea of no contest is appropriate.

Here, the court failed to establish support for a finding that one or more of the statutory grounds alleged in the petition were true. The court merely read the first paragraph of the petition and asked the mother, “do you admit that allegation?" to which the mother replied “yes, I do." This exchange was clearly insufficient to establish a factual basis for the plea.

Respondent asserts that the order terminating his parental rights must be vacated if this Court sets aside the adjudication. We agree. First, MCR 3.977(E) provides, in pertinent part, that the necessary prerequisites for a court to consider termination of a respondent's parental rights at the initial dispositional hearing are “(1) the original, or amended, petition contains a request for termination; [and] (2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established."

In this case, the trier of fact could not find by a preponderance of the evidence that one or more of the grounds for the assumption of jurisdiction over the child had been established by the mother's plea, because the plea was invalid. Because he adjudication was invalid, the dispositional orders, including the order terminating respondent's parental rights, are invalid.[4] *Id, at* 747 N.W.2d 554; 277 Mich.App. 673-675.

F. The process of holding a mediation and holding a plea of admission in abeyance is in conflict with MCR 3.972 which requires that the trial be heard 63 days after the child is removed from the home.

[4] *In re S.L.H.*, 747 N.W.2d 554; 277 Mich.App. 673-675 (2008)

MCR 3.972 requires that the adjudication hearing trial must "commence as soon as possible but not later than 63 days after the child is removed from the home, unless the trial is postponed on stipulation of the parties for cause."

Here, the children were removed on January 11, 2012 and the court did not take formal jurisdiction over the children until January 31, 2013. Two of the children were in placement with their father so MCR 3.972 requires that the trial occur within six months but one of the children was not in a relative's placement so the trial should have occurred within 63 days of January 11, 2012.

The failure for the court to wait a year to adjudicate a parent violates the Appellant Mother's due process rights.

H. Conclusion

The fundamental liberty interest in continuing to be a parent is obviously an important one. That said, the adjudication phase carries with it the most important procedural protections that exist to insure the fairness of the proceedings. The adjudication phase is the only phase of the proceedings where the parent has a right to a jury trial and typically the only hearing where the Michigan Rules of Evidence apply. Submitting a mediation agreement that is a year old and using that writing to form the basis of a respondent parent's plea when the respondent parent is not present does not constitute a valid adjudication.

RELIEF REQUESTED

Appellant Mother respectfully requests that this Court find that the "collateral attack" rule does not apply to appeals from dispositional orders that are not preceded by a valid adjudication. This Court should hold that the "collateral attack" rule does bar Appellant Mother's due process challenge. Finally, Appellant Mother is requesting that This Court reverse the Michigan Court of Appeals and remand this matter back to the trial court for a proper adjudication.

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Dated: May 27, 2015